Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

THOMAS E. GARRITY, III,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a criminal prosecution where intent is an element of the crime charged, an essential contested issue at trial, and the primary defense was reliance on an Indemnity Agreement, did the trial judge's ruling that the defendant could not rely on the Indemnity Agreement as a matter of law after the evidence closed, and without the opportunity to offer additional evidence:

a. violate the Due Process Clause of the Fourteenth Amendment protecting an "accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" as held in *In Re Winship*, 397 U.S. 358, 364 (1970)?

b. violate the Due Process Clause of the Fourteenth Amendment by creating a conclusive presumption that "would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] factfinding function' . . . [assigned] solely to the jury." as held in *Sandstrom* v. *Montana*, 442 U.S. 510, 523 (1979)?

c. violate the Due Process Clause of the Fourteenth Amendment by impermissibly shifting the burden of proof from the Commonwealth to the defendant, by creating a mandatory or a rebuttable presumption of intent, thus relieving the Commonwealth of its burden of proof as held in *Francis* v. *Franklin*, 471 U.S. 307, 326 (1985)?

d. violate the defendant's right to make a defense, recognized by the Sixth Amendment in *Rock* v. *Arkansas*, 483 U.S. 44, 55, 56 (1987)?

e. violate the Due Process Clause of the Fifth Amendment and the right to a trial by jury in the Sixth Amendment, by preventing the jury from determining every element of the crime with which a defendant is charged, including factual issues, as well as the "materiality" of the legal issues, as held in *U.S.* v. *Gaudin*, U.S. , 115 S.Ct. 2310, 2320 (1995)?

2. Were all of the preceding Constitutional questions recognized and resolved properly by the Massachusetts courts?

LIST OF ALL PARTIES TO THE PROCEEDING

a. The plaintiff: Thomas E. Garrity, a citizen of the State of New Hampshire, who resides at Twenty Chestnut Street, Apartment N-26, Exeter, New Hampshire 03833.

b. The defendant: The Commonwealth of Massachusetts, which is represented by the District Attorney of Middlesex County, Forty Thorndike Street, Cambridge, Massachusetts 02141.

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CITATIONS OF THE OFFICIAL REPORTS OF THE OPINIONS ENTERED BY THE COURTS

a. At trial: *Commonwealth* v. *Thomas E. Garrity, III*, Middlesex Superior Court, number 93-464. Guilty verdict entered on July 1, 1994 after trial by the Court (BOTSFORD, J.) and a jury.

b. On appeal: *Commonwealth* v. *Thomas E. Garrity, III*, Appeals Court, number 95-P-2183, reported at 43 Mass. App. Ct. 349; rescript dated August 12, 1997 affirming the judgment of the Middlesex Superior Court.

c. Further Appellate Review: *Commonwealth* v. *Thomas E. Garrity, III*, Supreme Judicial Court number FAR 9372, reported at 426 Mass. 1101. Further Appellate Review denied on September 25, 1997.

BASIS FOR JURISDICTION

a. The judgment sought to be reviewed was entered:

i. at trial: July 1, 1994;
ii. on appeal: August 12, 1997;
iii Application for Further Appellate Review: September 25, 1997.

b. An Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari in the Supreme Court of the United States was allowed by the Court (SOUTER, J.) on December 23, 1997 extending the time to and including February 22, 1998.

c. The statutory provision that confers jurisdiction on this Court to review on a writ of certiorari the judgment in question is 28 USC § 1257. ("Final judgments . . . rendered by the highest court of a State . . . where any . . . right . . . is . . . claimed under the Constitution . . . of the United States.)"

THE CONSTITUTIONAL PROVISIONS INVOLVED

a. Fifth Amendment;
b. Sixth Amendment;
c. Fourteenth Amendment.

STATEMENT OF THE CASE

In 1965, Thomas E. Garrity, III's unmarried, paternal aunt, Helen B. Garrity, created the Helen B. Garrity Trust. She named her brother, T. Edmund Garrity, and two of his sons, Trustees, and named T. Edmund Garrity's children, her niece and nephews, beneficiaries. She transferred title to her Belmont, Massachusetts residence to the Trustees, but continued to live there.

By 1985, Helen B. Garrity was no longer living in the Belmont residence, and the elder Garrity decided to sell it.

However, because the house has been insulated with urea-formaldehyde foam insulation (UFFI), potential buyers lost interest when that was disclosed.[1]

To eliminate the UFFI problem, the elder Garrity hired a contractor recommended by his son, Thomas E. Garrity, III, to remove the UFFI. On November 24, 1985 the contractor executed a writing representing that he had removed all of the UFFI, neutralized the walls chemically, and had them re-insulated. He also wrote, "Job quality 100%."

In January, 1986 Thomas E. Garrity, III's business partner, Donald W. Ryan, entered into an agreement with the elder Garrity as Trustee, to buy the Belmont realty. As a condition of the sale, Mr. Garrity as Trustee agreed to give Mr. Ryan an Indemnity Agreement relating to the UFFI.

A week before title was transferred, Thomas E. Garrity, III, agreed to take title to the Belmont realty with Mr. Ryan, and title was conveyed to them on June 13, 1986. On June 16, 1986 Mr. Ryan assigned the Indemnity Agreement to Thomas E. Garrity, III and himself.

On December 25, 1986 the elder Garrity died, leaving a Will naming his son, Thomas E. Garrity, III, Executor. His Will was probated and Thomas E. Garrity, III was named his Executor by the Middlesex Probate Court. The estate was valued at $467,881.46.

Late in January, or early in February, 1987, the water pipes in the Belmont realty froze and burst because of a failure to deliver fuel oil. The walls from the second floor to the basement became water damaged, destroying all of the renovations. To repair the damage and allow the walls to dry, the existing plaster was removed, exposing the presence of UFFI. Where the UFFI had been removed, insulation had been applied unevenly, leaving uninsulated areas.

In October, 1987 Thomas E. Garrity, III and Mr. Ryan met with Mr. Garrity's brothers, one of whom had succeeded his

[1] A Massachusetts statute, Gen. Laws ch. 255 § 12I, mandates disclosure of the presence of such insulation, its location, a copy of test results, if any, of noxious fumes, and other requirements not here material.

late father as Trustee. They were shown that UFFI remained on the realty, and were requested to reimburse Messrs. Garrity and Ryan under the Indemnity Agreement. Instead, the Trustees filed a complaint against Messrs. Garrity and Ryan seeking payment of their purchase money note used to buy the Belmont realty. Messrs. Garrity and Ryan filed a counterclaim seeking indemnification for losses under section "1", the warranty portion of the Indemnity Agreement.

Beginning in September, 1988 and continuing to October, 1990, Mr. Garrity withdrew some $276,969 from his father's estate to partially cover over $500,000 of carrying costs of the Belmont realty. Mr. Garrity relied on the Indemnity Agreement in making those payments, and showed those withdrawals on the accounts he filed as Executor, as being made under the Indemnity Agreement.

When Mr. Garrity decided to name his father's estate as a defendant in the pending litigation brought by his brothers as Trustees to recover the purchase money for the Belmont realty, he recognized his conflict of interest, and resigned as Executor.

His successor reported the withdrawals to Mr. Garrity's brothers and sister, who filed a complaint with the Middlesex District Attorney. A grand jury indicted Mr. Garrity for fiduciary embezzlement under Mass. Gen. Laws chap. 266, § 57 on March 11, 1993.

After pre-trial skirmishing to dismiss the indictment, Mr. Garrity was tried on June 29, 30 and July 1, 1994 before the Middlesex Superior Court (BOTSFORD, J.) and a jury. Mr. Garrity testified that he relied on the advice of counsel in making payments from his father's estate to pay for the carrying costs of the Belmont realty. Since his father and brothers had signed the Indemnity Agreement, he felt that they were personally responsible. And, as Executor of his father's Estate, it was his decision which contracts of his father he would perform.

Because of the close relation with his father, the conversation he had with his father regarding the potential for UFFI before the purchase, that the Indemnity Agreement was

drafted by his father's lawyer to "hold them harmless" as buyers, and that he and Mr. Ryan would not have bought the realty without having received the Indemnity Agreement as a part of the purchase, Mr. Garrity knew that his father would have performed on the Agreement had he lived. As his Executor, Mr. Garrity exercised his discretion to perform his father's obligations as a signatory to the Indemnity Agreement.

Mr. Garrity moved for a required finding of not guilty at the close of the Commonwealth's evidence, and at the close of all evidence. Each was denied.

After closing arguments, the trial judge instructed the jury generally on the presumption of innocence enjoyed by the defendant, general instructions on the jury's function to find facts, the evidence to be considered, and the Commonwealth's burden of proof of guilt beyond a reasonable doubt. She then gave this instruction on embezzlement.

> Now, let me go over those elements separately.
>
> The first one is that the defendant was an executor during the relevant time period and that is an element that is not disputed. It is agreed by both sides that during the time period covered in this indictment Mr. Garrity was indeed the executor of his father's estate.
>
> The second, and I just — I'm sure you picked this up in this trial if you didn't know it before but an executor is the person who is either named in a will of a person who dies or thereafter may be appointed by a court who is in charge of administering the estate of somebody who's died. Mr. Garrity, during this time period, held that role, that position.
>
> The second element which the Commonwealth must prove beyond a reasonable doubt is that the defendant in his capacity as executor held or possessed money, goods or property for the use or benefit either in whole or in part of some other person.

In this case the other person is really persons and it is the beneficiaries of the estate of his father, T. Edmond Garrity.

Again, with this element you don't have to spend any time on it because I think it is agreed as you will find both from what you heard and in the stipulation of facts that as executor Thomas Garrity did hold money, goods or property that belonged to the estate and therefore were for the use and benefit ultimately of the beneficiaries of that estate.

So, there really isn't any dispute about element two.

The third element is that the defendant embezzled money, goods or property or converted or appropriated such money, goods or property to his own use or benefit or to the use or benefit of some third person and did so without the consent of the beneficiaries and without legal authority or right to do so.

* * *

So, let me turn again to that third element which is that the defendant while serving as executor embezzled money or property or converted or appropriated money or property to his own use or benefits without the consent of the beneficiaries and without legal authority to do so.

The term embezzlement which is used here, let me define that for you.

It means to fraudulently take property of another where there is a relationship of trust and confidence between the owners of the property and the person who takes the property.

In this case the owners of the property would ultimately be the estate but then ultimately the beneficiaries of the estate and the person who is alleged to have taken the property would be the executor.

So, that's what embezzlement means.

The term convert which is also used and you will see it in the indictment, convert to his own use. It means to act in a manner which deprives the owner of his interest in the property permanently.

The term appropriate means to take as one's own without permission.

So, what the Commonwealth must prove beyond a reasonable doubt is that the defendant took property belonging to the estate in one of these ways, embezzled it or converted it or appropriated it as I've defined those terms without the consent or permission of the beneficiaries and without the legal authority or right to do so.

Now, in terms of without the consent or permission of the beneficiaries I don't think that needs further definition. It is for you to determine based on all the facts and circumstances that have been presented in the evidence whether the Commonwealth has proved beyond a reasonable doubt that Thomas Garrity, when he was serving as executor, took property without the beneficiaries consent.

The other part of that is, without legal right or authority to do so. As I've said to you, and let me talk about that, as I've said to you an executor is responsible for the administration of the estate and for paying just debts and expenses of the estate and for carrying out valid contracts of the estate which may include contracts that the decedent entered into before he died.

What the Commonwealth must prove here beyond a reasonable doubt is that Mr. Garrity, if you find that he withdrew and took for his own use or benefit money or property that was part of the estate, that he did so without legal right or authority and in substance that he did so not to pay the just debts or expenses or in honoring a valid contract of the estate.

The trial judge then gave this instruction on the Indemnity Agreement.

> In this connection on this element [a valid contract of the estate] you may consider the indemnity agreement of which you've heard a great deal in this case and it is Exhibit, I believe, 25 in evidence before you. It's not included in the black book but it will be before you as a separate exhibit.
>
> The interpretation of the indemnity agreement is a question of law for the Court, that is me, and so I am going to give you the interpretation of that agreement at this time.
>
> The agreement provides by its terms and in particular paragraph two that the Helen B. Garrity Trust, acting through its trustees, indemnifies, which essentially means to hold financially harmless, it agrees to indemnify or hold harmless the buyers of the property at issue which is 18-20 Townshend Road.
>
> Which you know, the buyers of the property were as mentioned in the indemnity agreement Mr. Ryan but also through his assignment of this agreement would include Thomas Garrity himself as an individual.
>
> So, this indemnity agreement provides that the trust acting through its trustees agree to hold financially harmless, if you will, the buyers of this property against any claims of injury, illness or other damage which is directly related to urea-formaldehyde and which results in a lawsuit and ultimately a judgment in a lawsuit against one or both of the buyers.
>
> In other words, a claim made against the buyers on account of the urea-formaldehyde, that claim is litigated, it results in a judgment against the buyers and if that's the case they would be entitled to reim-

bursement and recovery of whatever damages they were obligated to pay in that regard.

I tell you as a matter of law that the agreement creates — the indemnity obligation that I've just defined for you, it imposes that obligation on the trust and its trustees in their capacity of trustees of the trust.

It does not create or impose an obligation on any of the three trustees as individuals.

Thus, as a matter of law the agreement did not create a personal obligation on the part of T. Edmond Garrity, one of the three trustees, and thus did not create an obligation on the part of his estate.

For the same reason this was not, the indemnification agreement was not and is not a contract made by T. Edmond Garrity individually that became a contract that was the obligation of the estate.

So, just to summarize this third element, it is for you to determine based on all the facts and circumstances that you've heard whether the Commonwealth has proved these elements that I've laid out for you.

One, that Mr. Garrity, I mean these factors, I should say, because it is the third element, that Mr. Garrity took money either by embezzlement, by conversion or by appropriation money or property for his own use or benefit or the benefit of a third person and that the money or property, belonged to the estate originally, that he did so without the consent of the beneficiaries and without the legal right or authority to do so.

That leaves us with the fourth element and I will turn to that.

That is this, the defendant, if you find the defendant did so take property belonging to the estate for his own benefit or use without consent or without legal authority the Commonwealth is also required to prove beyond a reasonable doubt that when he took such action he did so fraudulently, meaning with fraudulent intent.

I would like to define that for you, what fraudulent intent means in this context.

First of all, as I say the Commonwealth must prove that the actions taken by Mr. Garrity with respect to the claimed withdrawals of money that the Commonwealth claims it must prove that Mr. Garrity acted with a specific intent, fraudulent intent.

We have in the law two kinds of intent, general intent and specific intent.

General intent is often referred to as reflexive action. You intend to do something but you don't focus or concentrate on that particular act.

An example might be walking up stairs or sitting down in a chair. You intended to sit on the chair but you didn't generally specifically focus on the idea that you were going to sit in the chair before you did it.

That's not what's required here. What is required for the Commonwealth to prove here is specific intent. A specific fraudulent intent but in terms of the specific part of that it must prove that Mr. Garrity acted, that he did specifically focus and concentrate and take these actions in a fraudulent manner. I'm going to define for you what that means.

But, it was not by accident, mistake or otherwise. That there was a specific concentrating and focusing of his mind to do these actions in a fraudulent manner.

Now, let me define for you what fraudulent intent means in this context.

The term fraudulently as I am using it here refers to the character of the embezzlement or conversion or appropriation, that is, the taking of property.

It refers to the intent of the defendant in carrying out any one of those acts.

To act with fraudulent intent in this context means that Mr. Garrity had the specific intent to gain some undue advantage for himself or to injure or harm some other person by means of a representation or represen-

tations that he knew to be false when he made them or by an act or acts which he took knowing them to be wrongful and in violation of an affirmative duty that he had.

So, what the Commonwealth must prove is that Thomas Garrity, the defendant, embezzled or converted or appropriated property belonging to the estate with the specific intent to gain some advantage for himself or to harm somebody else and that he did so knowing that it was wrong to do so or that it was in violation of his duties as an executor to the estate.

In this regard the defendant, Thomas Garrity, claims that he believes he had a legal right to withdraw those funds, the funds that he did withdraw and he claims that he did so for reimbursement of costs that he spent on rectifying the condition of the Townshend Road property and that he took the money as reimbursement pursuant to the indemnity agreement.

If a person has an honest, good faith and reasonable belief that he took property under a legal right to do so even though that belief might be mistaken he does not have the requisite fraudulent intent.

The belief must be held in good faith, the belief that he had the authority to take the property must be honest and that is held in good faith and it must be one that is reasonable in the circumstances. That is, that a reasonably prudent person in the defendant's same position, knowing what the defendant knew and in the same circumstances as the defendant found himself a reasonable person would reasonably believe that he had the authority to take those funds as reimbursement.

If you find that the defendant did have a mistaken but honest and reasonable belief that he was authorized to take the monies in question as reimbursement pursuant to the indemnity agreement then you would find that he did not have — that the Commonwealth has not proved

the requisite fraudulent intent that it is an element of this crime.

In this regard, too, on the question of whether Mr. Garrity acted with an honest good faith and reasonable belief that he had authority to do so you may consider his additional claim that he acted on the advice of counsel.

If you find that Mr. Garrity in good faith and for purposes of determining the lawfulness of his future conduct consulted with an attorney, provided that attorney with a statement, full statement of the material facts concerning the transaction or the proposed transaction and that he received advice from the attorney and relied on that advice in so acting you may consider such facts on the issue of whether the defendant did honestly believe that he had the legal right and authority to withdraw the funds in question.

In all of this, of course, it is the Commonwealth's burden to prove that he did have the fraudulent intent and therefore that he did not have a reasonable and honest and good faith belief that he was — that he had a legal right to withdraw the funds.

The jury then retired to deliberate and obviously recognized the dilemma in which they were: if the judge ruled as a matter of law that the Indemnity Agreement was not one on which the Trustees as signatories had any personal responsibility, how could Mr. Garrity have "the good faith belief" albeit "mistaken but honest and reasonable", that he had a right to perform his father's contract?

That prompted the jury to return and ask this question, "Of the four conditions (stipulations to determine embezzlement) number three, what exactly is legal justification or do you have a copy of the law?"

The trial judge then repeated the essence of her instructions, using this language on the interpretation of the Indemnity Agreement.

> I told you that the indemnity agreement, the interpretation of it was a question of law for the Court and I told you that that agreement which is in evidence before you imposes an indemnity obligation on the three trustees of the Helen B. Garrity Trust in their capacity of trustees. It does not impose an obligation on them personally or individually.
>
> Since that is true there was no personal or individual liability under that agreement on the part of T. Edmond Garrity and there would be no obligation for T. Edmond Garrity's estate to honor that particular contract because Mr. Garrity himself was not personally obligated under it.
>
> So, you are to accept that interpretation of the agreement as a matter of law. You may consider it when you consider whether the Commonwealth has proved that Mr. Garrity did not have legal justification to take these monies in reimbursement for valid expenses of the estate.

Shortly thereafter, the jury returned with a guilty verdict. Mr. Garrity filed a timely appeal to the Appeals Court. There he argued that the jury charge that Mr. Garrity could not rely on the Indemnity Agreement as a matter of law, created a conclusive presumption of guilty, and was thus unconstitutional. *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). "Conclusive presumptions 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.'" It would also "'invade the factfinding function' which in a criminal case the law assigns solely to the jury." *Ibid.*, page 523.

Mr. Garrity also argued that when a judge gives a conclusive presumption in a charge, or one that is rebuttable, either is unconstitutional under the Due Process Clause. It shifts the burden of proof of each element of the crime from the State to the defendant. It makes the defendant rebut the presump-

tion created. That is what is forbidden in *Francis* v. *Franklin*, 471 U.S. 307, 317 (1985).

The Appeals Court did not acknowledge either of these Supreme Court precedents by name, and made short shrift of the burden-shifting argument in one sentence. "'[T]he construction of an unambiguous written contract . . . [is] a pure question of law'" for the court. Two Massachusetts cases were cited. "Here, the challenged instruction did not shift the burden of proof impermissibly to the defendant. Rather, it accurately reflected the current state of the law in this Commonwealth." *Comm.* v. *Garrity*, 43 Mass. App. Ct. 349, 359 (1997).

Mr. Garrity's timely application for Further Appellate Review by the Supreme Judicial Court was denied without any opinion on September 25, 1997. 426 Mass. 1101. (1997).

Mr. Garrity's Motion to Extend the Time Within Which to File a Petition for Certiorari was allowed by this Court (SOUTER, J.) by letter of December 23, 1997 extending the time to and including February 22, 1997.

ARGUMENT

For nearly sixty years, and perhaps more, Massachusetts has recognized that there can be no conviction for embezzlement without fraudulent intent. The earlier of the two most often-cited cases for this proposition is *Comm.* v. *O'Brien*, 305 Mass. 393 (1940). O'Brien was the city treasurer of Revere from 1927 to early in 1935, when he was elected mayor. When he turned over the funds he was holding to his successor, a shortage was found. Some months later, the missing amount was found in a "tin box" in the vault. Persons other than Mr. O'Brien had access to the vault. The Commonwealth's evidence did not exclude the possibility of loss in ways other than the defendant's fraudulent taking, nor did Mr. O'Brien evade in explaining the shortage. No one talked to him about the shortage until Mr. O'Brien himself sent for accountants approximately five months after he was elected mayor. He did

not flee, or make representations as treasurer until five months later, and he never refused "to account for the shortage." pages 401-402.

The Supreme Judicial Court ruled, "There is no direct evidence of any fraudulent conversion or taking of money." Therefore, as a matter of law, there could be no fraudulent intent and the defendant's motion for a directed verdict should have been allowed. His conviction was reversed.

The second, more recent case is *Comm.* v. *Schmukler*, 22 Mass. App. Ct. 432 (1986). Schmukler was appointed by the Probate Court as conservator for an elderly incompetent person. Irregularities in handling the ward's estate resulted in an indictment under Gen. Laws chap. 266, § 57, the same statute under which Mr. Garrity was charged.

The trial judge did not instruct that fraudulent intent was a necessary element of the crime charged. The Appeals Court's observation is significant for Schmukler, as well as here. "As a practical matter, the outcome depended upon the jury's belief as to the defendant's state of mind." page 436.

Because the statute is a penal one, it must be strictly construed and any ambiguities must be resolved in favor of a defendant. To prove the necessity of fraudulent intent in embezzlement, the Appeals Court postulated that the conservator might reimburse himself for necessary expenses he paid for the ward. Then, show those expenses on his account to the Probate Court and have them approved. He would then have taken money from the ward, but without fraudulent intent, there would be no crime. He would be liable civilly.

The Appeals Court held that Schmukler was entitled to a new trial since fraudulent intent is an element to be proved by the Commonwealth in an indictment for embezzlement.

While the trial judge in this case did give specific instructions on fraudulent intent, she ran afoul of Supreme Court precedents that prevent a trial judge from invading the fact-finding functions of the jury, by controlling that function with instructions of law that predetermine guilt. The analysis that follows shows that the totality of the charge, placed the

burden on Mr. Garrity to show that he had a good faith belief that he could rely on the Indemnity Agreement signed by his father and brothers. That shifted the burden of proof from the Commonwealth to Mr. Garrity as defendant, in violation of Due Process Guaranties.

In re Winship, 397 U.S. 358 (1970), established the right of juveniles and adults accused of a crime, must be convicted by proof beyond a reasonable doubt. That is a Constitutional Due Process guarantee.

In Sandstrom v. *Montana*, 442 U.S. 510 (1979), the trial judge instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." In reversing Sandstrom's conviction, the court held such an instruction either shifts the burden of proof from the State to the defendant, or forces the jury to presume an element of proof required of the State. As such, it violates the Due Process Clause of the Fourteenth Amendment, and is unconstitutional. *Sandstrom* cited *In re Winship*, as holding "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact* necessary to constitute the crime with which he is charged." page 520.

The presumption of intent had the effect of relieving the State of the burden of proof "on the critical question of petitioner's state of mind." page 521. Sandstrom's conviction was reversed because he was deprived of due process of law.

In *Francis* v. *Franklin*, 471 U.S. 307 (1985), the trial judge recognized the *Sandstrom* admonition, and believed that his instruction complied by giving the defendant an opportunity to rebut the presumption. This is a portion of the language he used: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted." page 311.

Francis cited *In re Winship, supra,* as well as *Sandstrom*, and held that even though the defendant was given the opportunity to rebut, the jury may have interpreted the instruction "as a mandatory presumption that shifted the burden of per-

suasion on the element of intent once the State had proved the predicate acts." page 316. Or, the jury may have understood the charge to be mandatory but rebuttable, shifting the burden of proof to the defendant.

The court held that the instruction shifted the burden of proof on "the crucial element of intent, and because the charge read as a whole does not explain or cure the error, [it] does not comport with the requirements of the Due Process Clause." page 325.

Mr. Garrity suggests that there may be yet another Constitutional guarantee that was denied to him at trial by the timing of the judge's determination that he could not rely on the Indemnity Agreement: it was made after the evidence had closed. Mr. Garrity testified in his own behalf to the close relation that existed between him and his father (his father chose him to be Executor of his Will), that he relied on the Indemnity Agreement as a condition of the purchase of the realty, the intent of the Indemnity Agreement was "to hold him harmless" from the presence of UFFI, that he relied on the advice of counsel that the Agreement was a personal undertaking of his father, and finally, that he alone as Executor had the obligation and right to decide which of his father's contracts he would perform.

In Massachusetts, "the legal representatives of a deceased person are bound to perform his contracts and are liable for breach of them." *Mulloney* v. *Black*, 244 Mass. 391, 394 (1923). And, an executor may perform his estate's contract without further authority. "The obligation of the testator as guarantor of the lease subsisted after his death, constituted a liability of his estate, and might be discharged by his executor without express testamentary authority to that end." *Hall* v. *Bolster*, 255 Mass. 262, 264 (1926).

There is also statutory authority to fasten personal liability on a trustee. Gen Laws chap. 203, § 14 A, second paragraph reads:

> "A trustee shall be personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the court of administration of the trust estate only if he was personally at fault."

The decisional law interpreting this statute is consistent. *Apahouser Lock & Security Corp.* v. *Carvelli*, 26 Mass. App. Ct. 385 (1988); FAR den. 403 Mass. 1104 (1988).

The trial judge therefore knew of the overriding importance the personal obligation of each of the Trustees as signatories to the Indemnity Agreement. It was after all, a contract between family members, and not one negotiated at arm's-length by strangers. The practical effect of ruling that Mr. Garrity could not rely on the Indemnity Agreement as a matter of law at the close of the evidence was to deny him the right to make a defense.

In *Rock* v. *Arkansas*, 483 U.S. 44 (1987), a wife who shot her husband sought to have her hypnotically-induced recollection of the event, admitted into evidence. This court recognized the right of a criminal defendant to represent himself, and to testify in his own behalf: the right to make a defense. pages 55, 56.

Of course, Mr. Garrity was given the opportunity to testify at his trial, and he did so at length putting in the record the items above. But, the mischief that occurred here was that he was not given the opportunity to testify with the knowledge that the judge was going to charge the jury that he could not rely on the Indemnity Agreement as a matter of law. Mr. Garrity concedes that his testimony may not have differed by one syllable had he been given the opportunity to testify with the knowledge of the trial judge's ruling. But, he may very well have been able to add some additional fact, disclose some additional conversation or event that would have convinced the jury of his good faith reliance that his father had personal liability on the Indemnity Agreement.

Mr. Garrity should have been allowed to testify as to the trust and confidence he reposed in his father and brothers

in receiving the Indemnity Agreement, of which they knew. That created a trust by personal confidence. *Reed* v. *A. E. Little Co.*, 256 Mass. 442 (1926). And, having received advice of counsel, he should have been able to testify to the advice that he got, as evidence of his state of mind. Both *O'Brien* and *Schmukler* hold that fraudulent intent is subjective.

Such evidence was therefore mandatory if Mr. Garrity had been given the required right of making a defense. And, it certainly was "material" to the Indemnity Agreement, as will be argued below.

That would have tipped the balance on his lack of fraudulent intent, which was so critical as the necessary element of the crime with which he was charged. Mr. Garrity's state of mind was crucial, and he was deprived of the opportunity to make that known to the jury after the judge made her ruling. That had the practical effect of denying him the opportunity to make a defense. This inability to introduce relevant information consonant with the judge's ruling had "a significant adverse effect".

The right to testify in one's own behalf guaranteed by *Rock* means that a defendant must be given the opportunity to make a meaningful defense to all of the operative elements that have been put in issue. Otherwise, the right is illusory. To give the *Rock* holding judicial life, the trial judge should have re-opened the evidence after she announced her decision that Mr. Garrity could not rely on the Indemnity Agreement as a matter of law, so that Mr. Garrity could testify on that issue.

There is further support for granting certiorari in the trial judge's ruling that the interpretation of the Indemnity Agreement was a matter of law for the court. She instructed the jury that they had to accept her interpretation of the Indemnity Agreement as a matter of law. That certainly would be a fair statement of Massachusetts law, as well as the law in the United States: the construction of an unambiguous writing, such as a contract presents a question of law for the court.

But, when that writing becomes material for the determination of guilt in a criminal proceeding, must the question of its materiality be determined by the court or the jury? That was the issue in *U.S.* v. *Gaudin*, U.S. , 115 S.Ct. 2310 (1995). Gaudin was indicted and convicted of making false statements on federal loan documents in violation of 18 USC § 1001, which penalizes concealment or falsification of a "material fact."

At the close of the evidence, the trial judge instructed the jury, "[t]he issue of materiality . . . is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements." The jury convicted Gaudin. But, the Court of Appeals for the Ninth Circuit reversed on the ground that materiality is to be decided by the jury. The conviction therefore was in violation of rights guaranteed to him by the Fifth and Sixth Amendments to the U.S. Constitution.

This court's opinion by Justice Scalia reviews the history of decision-making by courts and juries, the resolution of mixed questions of fact and law, as well as the Fifth and Sixth Amendments guarantees. The court holds that the Constitution "gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime charged. The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed that right."

In Mr. Garrity's case, the materiality of the Indemnity Agreement was not made an element of the crime by statute, but rather by the facts themselves. But, it was a material element in the case: one of probative value nonetheless. Rather than tell the jury that Mr. Garrity could not rely on the contract as a matter of law, which had the effect of telling the jury that no reasonable person could have relied on the Indemnity Agreement, and they as jurors had to apply the law as given to them, they should have been instructed in the law and allowed to decide for themselves.

Of course, the Gaudin opinion was delivered on June 19, 1995 and this trial took place in June, 1994. But, with the benefit of the cumulative insight of all of the cases cited, *Gaudin* included, the preferred inquiry would have been to have the jury answer these questions:

1. Was the Indemnity Agreement given as an inducement to the purchase of the Belmont realty?
2. Did Messrs. Garrity and Ryan rely on the Indemnity Agreement in buying the realty?
3. Did Messrs. Garrity and Ryan rely on the signatories of the Indemnity Agreement personally; was trust by personal confidence created because of the relation of the parties?
4. Given the relation of the parties, were the signatories of the Indemnity Agreement given sufficient notice of a claim by Messrs. Ryan and Garrity when they were shown the presence of UFFI on the realty?

Mr. Garrity submits that it was not any one violation of the precedents cited, but rather the cumulative, practical undoing of them all that prejudiced Mr. Garrity and tainted his conviction.

But, given Mr. Garrity's testimony, the Massachusetts decisional and statutory law on June 1, 1994, and the language of the Indemnity Agreement, the jury should have been instructed on the "materiality" of that law. It was an essential element of *fraudulent intent*, which was the Commonwealth's burden to prove, and would have been probative of the state of Mr. Garrity's mind, which is a *subjective* standard under *Schmukler, supra*. The jury should have been allowed to make that decision for themselves under *Gaudin*.

As has already been suggested, the second paragraph of Gen. Laws chap. 203, § 14A, makes a "trustee acting under a trust of the donative type associated with probate practice," *Apahouser, supra*, page 388, "personally liable for obligations

arising from ownership or control of property of the trust estate." And, this entire transaction began when Mr. Garrity's father and brothers as Trustees, sold the Trust's real property, and gave the Indemnity Agreement as a consideration of the sale.[1]

In *Apahouser*, the Appeals Court reviewed the construction and legislative history of Gen. Laws, chap. 203, § 14A, noting that it became effective on January 1, 1978. Page 386. The *Apahouser* opinion was announced on September 16, 1988, so that the parties and the court were bound by both the statute, as well as the decisional law as it existed on June 1, 1994.

The facts in *Apahouser* are significant for the issues here, because the Appeals Court itself cites *Apahouser* as authority in the *Garrity* opinion. Page 385. Carvelli became trustee of "a 'nominee trust,' a common device for holding title to real estate in Massachusetts." He signed a purchase order with Apahouser to furnish and install "electric wiring, an intercom, mailboxes, and a fire alarm system" as "Carvelli, Trustee". When the building was destroyed by fire, Apahouser sought to establish personal liability for payment of its charges on Carvelli, by summary judgment. Carvelli opposed on the ground that he signed the purchase order as Trustee, and the first paragraph of Gen. Laws, chap. 203, 14 A,[2] exempts a trustee from personal liability.

The trial judge entered summary judgment for Apahouser and the Appeals Court sustained him, reasoning:

> "From the language of the second paragraph of § 14 A, its legislative history, and its context, it appears that

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[1] The primary meaning of the word [owner] as applied to land is one who owns the fee and who has the right to dispose of the property . . . *Comm.* v. *One 1986 Volkswagen GTI Automobile*, 417 Mass . 369, 372, f.n. 8 (1994). (Forfeiture proceeding under Gen. Laws, chap. 94C, §§ 32 and 34 of an automobile used in distributing controlled substances.)

[2] "Unless otherwise provided in the contract, a trustee shall not be personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he failed to reveal his representative capacity and identify the trust estate in the contract."

> the insulation with which the statute covers a trustee applies to a trustee acting under a trust of the donative type associated with probate practice, rather than a trustee of an organization conducting a business which the trustee as an individual controls." page 388.

In a suggestive footnote on the same page, the court observed, "If the Legislature had a broader purpose in enacting [the statute], it is, of course, open to amend G . L . c . 203, § 14 A." That invitation has been declined, and the statute remains as written.

The holding in *Apahouser* then, is that only a trustee of a trust of the donative type associated with probate practice is insulated from liability under the first paragraph of Gen. Laws. chap. 203, §14A. Business trustees do not enjoy such protection. But, the *Apahouser* court also recognized that the entire statute was enacted to affect trustees of "a trust of the donative type associated with probate practice," and that the statute also has a second paragraph that *does* fasten personal liability on such a trustee "for obligations arising from ownership or control of property of the trust estate . . .."

Immediately after quoting this statutory language, the *Apahouser* court recognizes the ambiguity of the wording in the second paragraph. But, it resolves that ambiguity by construing the second paragraph in this footnote on page 387:

> "The entire second paragraph reads as follows: 'A trustee shall be personally liable for obligations arising from the ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he was personally at fault.' We read the 'at fault' clause, coming after a disjunctive 'or', as not modifying the first clause relating to 'obligations,' especially as the words 'at fault' are not ordinarily associated with the word 'obligations,' while the idea of 'at fault' is linked to torts."

The *Apahouser* holding therefore is that a business trustee obtains no protection from the first paragraph of G.L. chap. 203, § 14A. But, even a trustee "associated with probate practice becomes personally liable for obligations arising from the ownership or control of property of the trust estate." That would make Mr. Garrity's father and brothers personally liable under the Indemnity Agreement. The ownership of property also comprehends its sale, and the Indemnity Agreement was given as an obligation of that ownership. Personal liability is imposed on such trustees as an incident of ownership of property, as well as when those trustees are at fault in tort.[3]

Because Mr. Garrity's father and brothers became personally liable on the Indemnity Agreement by statute, and the case law interpreting that statute, personal liability was all but inescapable. Of course, a trustee might evade such liability by release or waiver. But, that didn't happen here. The Indemnity Agreement contains no such language. Therefore, resort to the Declaration of Trust would not be dispositive since the statute and case law were controlling. The Appeals Court arch comment on page 355 of *Garrity* that the advice of his attorney was given "without having reviewed the trust document" implies a legal result that might have been different. That was not so.

"A trust of the donative type associated with probate practice" in Massachusetts is governed by Gen. Laws chap. 203, § 14A, as well as by *Apahouser* and its successors. No matter how protective a trust document might be of a trustee, those statute and case law directives still control.

The controlling effect of those statutory and case law precedents were not given to the jury as a part of the judge's charge.

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[3] Obviously, the Legislature recognized that the prudent trustee would buy insurance for the "at fault" occurrences in the ownership of property. If there are benefits to owning property such as rental income, and the potential for appreciation, there are recognized, reciprocal detriments which an insurer can be paid to absorb.

In any event, the Legislature has not seen fit to amend Gen. Laws, chap. 203, § 14A since *Apahouser* was published.

Instead, she arrogated to herself the decision that the Indemnity Agreement imposed no personal obligation on the signatories. It is suggested that decision reflects an incorrect understanding of the law, given the specific language in the statute and *Apahouser*. Nonetheless, the Appeals Court held that the judge's instructions were "correct, clear, and thorough", *Garrity*, page 358, and "accurately reflected the current state of the law in this Commonwealth." page 359.

Mr. Garrity concedes that the Appeals Court is an arbiter of the law in Massachusetts, and may depart from its decisions at will. But, as of this date, the Appeals Court has not ruled explicitly that it is overruling its decision in *Apahouser*. And, even if it decided it would, how can the court escape the statutory mandate of G.L. chap. 203, § 14A? Nonetheless, by approving what the trial judge did, it is by implication, ignoring both the controlling statute and case law.

But, on the date of his trial and before, Mr. Garrity and those who counselled him, had a right to rely on the written statutory and case law holdings as they were commonly understood in making his defense. That understanding, and the advice on which it was based, were crucial to Mr. Garrity's state of mind, and the absence of fraudulent intent on his part. By depriving the jury of those material instructions of law, the trial judge committed an error of Constitutional proportions, and tainted the jury's verdict.

There is yet another significant element bearing on Mr. Garrity's state of mind, and his lack of fraudulent intent in believing that his father and brothers were personally liable on the Indemnity Agreement. The Agreement is in two parts. Paragraph 1 is a warranty that the UFFI has been removed, and those areas have been reinsulated. Paragraph 2 is an agreement to indemnify the buyers as a result of the presence of UFFI. Paragraph 3 creates the conditions for the operation of the Indemnity Agreement in Paragraph 2.

There is no question that as a result of the freeze-up, UFFI was found on the realty, there were gaps in the insulation, and the warranty was breached. That was also a material mis-

representation of fact by the Trustees that created a contract, as well as a tort claim.

The contract claim could be asserted against Mr. Garrity's father and brothers personally under the second paragraph of Gen. Laws chap. 203, § 14A as an obligation "arising from the ownership or control of property." But, the tort claim could be asserted against them personally as well. The misrepresentation of the presence of UFFI, while potentially innocent, was nonetheless false. The Massachusetts rule on misrepresentations of fact is stricter than in other states.

> " 'The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation.' Restatement: Torts, § 540."
>
> "In this Commonwealth, where the rule is stricter than that in many jurisdictions, a false though innocent representation of fact made of one's own knowledge may be the basis of liability. The same legal consequences attach to this type of representation as to one that is deliberately and consciously false."
>
> *Yorke* v. *Taylor*, 332 Mass. 368, 374 (1955).

It follows that Mr. Garrity's father and brothers became personally obligated under the Indemnity Agreement because of their misrepresentation of UFFI and failure to reinsulate. They were "personally at fault" under the strict Massachusetts misrepresentation standard in *Yorke*. Being at fault, triggers the latter portion of the second paragraph of Gen. Laws chap. 203, § 14A, imposing personal liability on a probate type trustee in "at fault" situations. The jury should have been instructed on this material element of the Massachusetts law since it bore directly on the interpretation of the Indemnity Agreement, and was indicative of the state of mind in proving fraudulent intent.

That failure to instruct the jury on all of these *material* ele-

ments of the law, violated Mr. Garrity's Constitutional rights as articulated in *Gaudin*, and tainted this jury verdict. "The defendant's motion for a required finding of not guilty at the close of the Commonwealth's case and, again, at the close of the evidence . . . raised the issue of the sufficiency of the evidence on the element of fraudulent intent." *Garrity*, page 353.

"A challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal constitutional claim." *Jackson* v. *Virginia*, 443 U.S. 307, 322 (1979).

The jury verdict, as well as the appellate opinions, were general ones that did not deal specifically with the federal issues raised here. Therefore, those questions are open for consideration by the Supreme Court to determine if the constitutional guarantees were recognized and enforced. That is an exclusively federal question, recognized by the cases in *Street* v. *New York*, 394 U.S. 576, 583 (1960). "The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts."

Respectfully submitted,

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February 16, 1998

95-P-2183 APPEALS COURT

COMMONWEALTH v. THOMAS E. GARRITY, THIRD.
43 Mass. App. Ct. 349
No. 95-P-2183.
MIDDLESEX. May 15, 1997. - August 12, 1997.
Present: WARNER, C.J., KASS, & JACOBS, JJ.

Fiduciary. Embezzlement. Evidence, Exculpatory. *Practice, Criminal,* Indictment, Grand jury proceedings, Required finding, Instructions to jury, Presumptions and burden of proof. *Grand Jury. Executor and Administrator. Intent. Superior Court,* Jurisdiction.

INDICTMENT found and returned in the Superior Court Department on March 17, 1993.

A pretrial motion to dismiss was heard by *Katherine Liacos Izzo,* J., and the case was tried before *Margot Botsford,* J.

Irving Marmer for the defendant.

Rosemary Daly, Assistant District Attorney, for the Commonwealth.

WARNER, C.J. A Superior Court jury convicted the defendant of fiduciary embezzlement (G. L. c. 266, § 57). On appeal, he argues that the indictment was defective due to the Commonwealth's failure to present potentially exculpatory evidence to the grand jury. He also claims that the trial judge erred in denying his motion for a required finding of not guilty and that the instructions on fiduciary embezzlement were deficient. Finally, the defendant maintains that the Superior Court lacked jurisdiction over the entire matter in light of the availability of sanctions against the defendant in the Probate Court. We affirm.

Considered in the light most favorable to the Commonwealth, the jury could have found the following facts beyond a reasonable doubt.[1] *Commonwealth* v. *Latimore,* 378 Mass.

[1] The parties stipulated to some of the facts that are set forth.

671, 677 (1979). On December 25, 1986, the defendant's father, T. Edmund Garrity, died leaving an estate valued at approximately $467,000. In his will, he left one third of his estate to his second wife and the remaining two thirds in equal shares to his seven surviving children, the eldest of whom was the defendant. The defendant was named executor of the estate and was appointed to serve in that capacity on January 12, 1987.

Prior to his death, T. Edmund Garrity had been a trustee of the Helen S. Garrity donative trust (the trust), established by his sister, which included among its assets a two-family residential building located on Townsend Road in Belmont (the Townsend Road property). The elder Garrity never had a financial interest in the trust, however, and the beneficiaries were the defendant and his siblings, the nieces and nephews of Helen B. Garrity.

Sometime in November, 1985, the trust retained a contractor to remove and replace urea-formaldehyde foam insulation (UFFI) that had been discovered at the Townsend Road property. In January, 1986, the trustees entered into a purchase and sale agreement with the defendant's business partner, Donald W. Ryan, in which Ryan agreed to purchase the property for $230,000. Subsequently, the trustees executed an agreement providing for Ryan's indemnification against "any and all claims of injury, sickness or illness or other damage to any person or entity [bearing] a proximate and direct causal relationship to the [UFFI] and [resulting] in the issuance of a judgment in favor of any such person or entity after a contested trial." The agreement also required Ryan to notify the trustees of any claims that might trigger the agreement and to afford the trust the opportunity to defend against them.

Title to the property was conveyed to Ryan and the defendant as tenants in common on June 13, 1986.[2] Ryan subse-

[2] The record is unclear as to exactly how the defendant became a buyer, but nothing turns on this.

quently assigned the indemnity agreement to himself and the defendant.[3] Shortly after purchasing the property, the partners began renovations, intending to resell the property at a profit. During the winter of 1987, however, water pipes in the residence froze and burst. As a result, the house incurred extensive water damage, and the presence of additional UFFI was revealed. The defendant and Ryan thereafter removed and replaced the remaining UFFI and proceeded with the planned renovations.

Approximately two years after T. Edmund Garrity's death, the defendant's siblings had yet to receive any information about the distribution of estate funds and hired an attorney to force the defendant to provide an accounting. The defendant filed the accounting, which covered the period between December 25, 1986, and December 2, 1988, on or about January 20, 1989. One of his brothers took exception to a withdrawal in the amount of $38,589, which was described as a "distribution to heirs." The beneficiaries of the estate subsequently petitioned the Probate Court for the removal of the defendant as executor. The defendant resigned while the petition was pending and was replaced by Richard Spillane, a certified public accountant known to several members of the family.

Spillane assembled the available records and attempted to determine the financial status of the estate. According to his calculations, only $3,000 in cash remained in the estate; $300,000.00 was missing from the cash accounts, and there were no contemporaneous records explaining the withdrawals. On November 29, 1990, Spillane contacted the defendant regarding the discrepancy. The defendant claimed that the money had been used to make repairs to the Townsend Road property. On or about October 14, 1992, a second accounting was filed. It covered the period from December 2,

[3] There is a question whether Ryan had the authority to make such an assignment and whether the defendant, therefore, would have been entitled to seek indemnification under any set of circumstances. We assume for purposes of this appeal that the assignment was valid.

1988, to December 5, 1990, and described withdrawals totalling $279,469.62 as "Reimbursements per Indemnification Agreement." Spillane reported his findings to the remaining beneficiaries, who contacted the district attorney. The resultant investigation revealed that between September, 1988, and October, 1990, the defendant had made twelve separate withdrawals from the estate's accounts totalling approximately $341,000. The withdrawals ranged from $5,100 to over $100,000.

At no time did the defendant notify any of the other beneficiaries under the will that he intended to reimburse himself from the estate pursuant to the indemnity agreement, nor did he ever request their permission to do so. Moreover, no contemporaneous records were made with respect to the amounts withdrawn or the purpose of the expenditures, and no documentation was ever produced to establish a direct correlation between the amounts withdrawn and the defendant's out-of-pocket expenses.

At trial, the defendant testified that the withdrawals were made pursuant to the indemnity agreement. He stated that he believed his father was personally liable under the agreement and, therefore, that he, as executor, was entitled to reimburse himself and Ryan for any expenses they incurred as a result of the presence of UFFI at the Townsend Road property. He also claimed to have written the checks only after seeking the advice of two attorneys, both of whom advised him that he was within his rights as executor of the estate.

1. *The indictment.* Before trial, the defendant moved to dismiss the indictment against him on the ground that the Commonwealth withheld certain exculpatory evidence from the grand jury. The grand jury were never informed of the existence of the indemnity agreement or the defendant's purported reliance upon it, and the defendant contends that this omission impaired the integrity of the proceedings. We disagree.

"'Prosecutors are not required in every instance to reveal all exculpatory evidence to a grand jury.' *Commonwealth* v. *McGahee*, 393 Mass. 743, 746 (1985)." *Commonwealth* v. *Trowbridge*, 419 Mass. 750, 753 (1995). Evidence must be disclosed, however, if it would "'greatly undermine the credibility of evidence likely to affect the grand jury's decision to indict.'" *Ibid.*, quoting from *Commonwealth* v. *McGahee*, *supra*. The question, therefore, is whether the grand jury's decision to indict would have been different had they been aware of the existence of the indemnity agreement. See *Commonwealth* v. *Mayfield*, 398 Mass. 615, 621 (1986); *Commonwealth* v. *Drumgold*, 423 Mass. 230, 235 (1996). The grand jury were informed that the defendant, as executor of his father's estate, had withdrawn approximately $341,000 over a three and one-half year period and deposited most, of the funds into his personal bank account or accounts under his control. They were also aware that the defendant never sought permission from the other beneficiaries, or informed them of his intentions, before making the withdrawals. Although the grand jury were not aware of the existence of the indemnity agreement on which the defendant purportedly relied in making the withdrawals, we conclude that the additional "information would not have greatly undermined the credibility of evidence against the defendant, and would not have affected significantly the grand jury's decision to indict." *Commonealth* v. *Trowbridge*, 419 Mass. at 754.

First, for reasons discussed later in this opinion, the agreement did not authorize the defendant to reimburse himself from the estate for the expenses he incurred on the Townsend Road property. Consequently, the existence of the indemnity agreement did not constitute "exculpatory evidence." Moreover, the total amount withdrawn by the defendant greatly exceeded his claimed losses.[4] Finally, even after learning of the indemnity agreement and hearing testimony from the

[4] The defendant withdrew more than $341,000 but was eventually able to document less than $280,000 in actual expenses.

defendant, his business partner, and one of his lawyers, supporting the defendant's claim that he believed he was entitled to reimburse himself pursuant to the agreement, a jury of twelve found him guilty beyond a reasonable doubt. Under these circumstances, it is reasonable to assume that disclosure of the existence of the indemnity agreement "to a grand jury seeking only *probable cause* would have had a negligible effect on their decision to indict" (emphasis in original). *Commonwealth* v. *LaVelle*, 414 Mass. 146, 151 n.2 (1993). *Commonwealth* v. *Drumgold*, 423 Mass. at 238-239.

2. *Motion for a required finding of not guilty.* The defendant's motion for a required finding of not guilty at the close of the Commonwealth's case and, again, at the close of the evidence, was denied. The motion raised the issue of the sufficiency of the evidence on the element of fraudulent intent. There was no error.

Fiduciary embezzlement by an executor requires a showing that: (1) the defendant was the executor during the relevant time period; (2) he had in his possession money, goods or property for the use or benefit either in whole or in part of some other person (in this case, the beneficiaries of the estate of T. Edmund Garrity); (3) he converted or appropriated the money or property to his own use or benefit or the benefit of a third person without the consent of the beneficiaries and without the legal right or legal authority to do so; and (4) he took such action with fraudulent intent. G. L. c. 266, § 57. *Commonwealth* v. *Schmukler*, 22 Mass. App. Ct. 432, 434-435 (1986). The defendant maintains that he was justified in using the estate's funds to reimburse himself for expenses incurred as a result of the presence of UFFI in the Townsend Road property under the terms of the indemnity agreement and argues, in the alternative, that his consultation with two lawyers prior to making the withdrawals precluded any finding that he possessed the fraudulent intent necessary to sustain his conviction.

The indemnity agreement provided that the defendant and Ryan would be indemnified against claims brought against

them for injuries or damages caused by the presence of UFFI in the Townsend Road property in the event four specific conditions were satisfied: (1) there was an actual claim of injury or damage; (2) the claim bore a direct causal relationship to the presence of UFFI; (3) the claim resulted in the issuance of a judgment after a contested trial; and (4) the trustees were notified of the claim and provided with the opportunity to defend against it. None of these conditions existed at the time the defendant made the contested withdrawals.

First and most important, no claim was ever brought against the defendant or Ryan as a result of the presence of UFFI in the Townsend Road property. Rather, the "losses" the defendant claims to have suffered were the result of the extensive renovations, including, but not limited to the removal of UFFI, undertaken after water damage revealed the presence of insulation that had not been detected during the initial removal and replacement. Moreover, the amount expended included not only the costs directly related to the removal and replacement of the UFFI, but numerous additional expenses, including the entire cost of renovating the house, monthly mortgage payments, and insurance premiums, taxes, and utilities.

Because the first prerequisite, that of an actual claim, was never met, the additional requirements could not be satisfied. Moreover, T. Edmund Garrity was not personally liable under the terms of the agreement and, therefore, the defendant was not entitled to use the estate's funds to indemnify himself under any circumstances. The Helen B. Garrity trust was a donative trust established for the benefit of the grantor's nieces and nephews and expressly provided that the trustees would be personally liable for their acts or omissions only if undertaken in bad faith. The elder Garrity never held any beneficial interest in the trust, and the indemnity agreement was executed by the trustees on behalf of the trust and not individually. See G. L. c. 203, § 14A (no personal liability for trustees unless otherwise provided in contract or trustee fails to reveal his representative capacity). See also *Apahouser*

Lock & Security Corp. v. *Carvelli*, 26 Mass. App. Ct. 385, 388 (1988) (Section 14A exemption from liability applies to trustees "acting under a trust of the donative type, associated with probate practice").

The defendant also argues that, even if he was not entitled to reimbursement under the agreement, his reliance on the advice of counsel constitutes a complete defense to the charge against him. In order to establish the advice-of-counsel defense, however, a defendant "must show that: (1) he is acting in good faith in the belief that he has good cause for his action and is not seeking an opinion in order to shelter himself; (2) he has made a full and honest disclosure of all the material facts within his knowledge or belief; (3) he is doubtful of his legal rights; (4) he has reason to know that his counsel is competent; (5) he honestly complied with his counsel's advice; and (6) his counsel is of such training and experience that he is able to exercise prudent judgment in such matters." *G.S. Enterprises. Inc.* v. *Falmouth Marine, Inc.*, 410 Mass. 262, 275 (1991). Here, the defendant testified that he consulted two attorneys and that both of them assured him that as executor, his actions were permissible. One of those attorneys, who is also the defendant's appellate counsel, testified that, although he was never specifically asked whether the defendant could withdraw funds from the estate in order to reimburse himself for expenses he had incurred as a result of the presence of the UFFI in the Townsend Road property, he did advise the defendant that, as executor, it was up to him to determine which of his father's contracts he wished to honor.[5] He further acknowledged that he rendered this advice without having reviewed the trust document.

On this testimony, it is far from clear that the defendant was entitled to an instruction on the advice-of-counsel defense, let alone a required finding of not guilty. See *ibid.* Nevertheless, the judge afforded him the benefit of the charge.

[5] The second attorney upon whom the defendant claimed to have relied died prior to the defendant's trial.

Specifically, she instructed the jury that, in determining whether or not the Commonwealth had proved the element of fraudulent intent beyond a reasonable doubt, they could consider the defendant's claim that he relied on the advice of counsel in making the withdrawals at issue and carefully and completely enumerated each of the elements of the advice-of-counsel defense.

Moreover, the Commonwealth presented sufficient evidence on the issue of fraudulent intent to preclude the granting of defendant's motion for a required finding. "A person's knowledge or intent is a matter of fact, which is often not susceptible of proof by direct evidence. Knowledge or intent, however, may be proved by inference from all the facts and circumstances developed at trial. *Commonwealth* v. *Casale*, 381 Mass. 167, 173 (1980)." *Commonwealth* v. *Costa*, 407 Mass. 216, 225 (1990). "The inferences drawn by the jury need only be reasonable and possible and need not be necessary or inescapable." *Ibid.*

Here, the evidence revealed that the defendant withdrew over $341,000 from his father's estate without providing any contemporaneous documentation. He failed to seek permission from the other beneficiaries or even to inform them of his intentions. The estate ledgers did not reflect the reasons for the withdrawals and the defendant did not mention the indemnity agreement or the Townsend Road property until he had resigned as executor and was pressed by Spillane to account for the missing funds. Indeed, during his tenure as executor, the defendant never filed an accounting with the Probate Court covering the period during which the great majority of withdrawals were made. Moreover, he did not step down until the beneficiaries demanded that he do so and, when he did resign, the cash assets of the estate were virtually depleted. Finally, the defendant never sought reimbursement directly from the trust, in spite of the fact that some cash remained in the trust bank accounts until well after he began withdrawing funds from the estate. Under these circumstances, the jury could reasonably have inferred that the

defendant possessed the requisite fraudulent intent. See *ibid.*

3. *Jury instructions.* The defendant next challenges the judge's instructions to the jury in several respects. First, he claims that the portion of the charge dealing with the distinction between general and specific intent confused the jury. Having reviewed the judge's instructions, we discern no error.

The judge properly instructed the jury on the elements of fiduciary embezzlement, including the element of fraudulent intent. When explaining the type of intent required to sustain a conviction for fiduciary embezzlement, the judge explained that there were two kinds of intent, general and specific. She then defined general intent.[6] Next, she explicitly told the jury that general intent was not what the Commonwealth was required to prove in this case, but rather, that specific intent was required. She then went on to describe specific intent in detail:

> "What is required for the Commonwealth to prove here is specific intent. A specific fraudulent intent . . . that [the defendant] did specifically focus and concentrate and take these actions in a fraudulent manner . . . [and] not by accident, mistake or otherwise. That there was a specific concentrating and focusing of his mind to do these actions in a fraudulent manner. . . .
>
> "To act with fraudulent intent in this context means that [the defendant] had the specific intent to gain some undue advantage for himself or to injure or harm some other person by means of a representation or representations that he knew to be false when he made them or by an act or acts which he took knowing them to be wrongful and in violation of an affirmative duty that he had.

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[6] The judge stated:

"General intent is often referred to as reflexive action. You intend to do something but you don't focus or concentrate on that particular act. An example might be walking up stairs or sitting down in a chair."

> "So, what the Commonwealth must prove is that Thomas Garrity, the defendant, embezzled or converted or appropriated property belonging to the estate with the specific intent to gain some advantage for himself or to harm somebody else and that he did so knowing that it was wrong to do so or that it was in violation of his duties as an executor to the estate."

With this correct, clear, and thorough instruction, no reasonable juror could have been misled into believing that the defendant could be convicted of fiduciary embezzlement in the absence of a finding that he possessed specific fraudulent intent. Contrast *Commonwealth* v. *Schmukler*, 22 Mass. App. Ct. at 434-435.

The defendant next takes issue with the fact that the judge instructed the jury that as "a matter of law the [indemnity] agreement did not create a personal obligation on the part of T. Edmund Garrity . . . [or] on the part of his estate." She went on to emphasize, however, that the defendant could not be convicted if the jury found that he honestly and reasonably (although mistakenly) believed that he was entitled to take the money.[7] As previously stated, the judge also told the jury that they could consider the defendant's alleged reliance on the advice of counsel in determining whether he had a good faith belief in the appropriateness of his actions.

The defendant argues that, because the judge prefaced the instruction on honest mistake by telling the jury that the

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[7] The judge instructed:

> "If a person has an honest, good faith and reasonable belief that he took property under a legal right to do so even though that belief might be mistaken he does not have the requisite fraudulent intent. "The belief must be held in good faith, the belief that he had the authority to take the property must be honest and that is held in good faith and it must be one that is reasonable in the circumstances. That is, that a reasonably prudent person in the defendant's same position, knowing what the defendant knew and in the same circumstances as the defendant found himself, a reasonable person would reasonably believe that he had the authority to take those funds as reimbursement."

indemnity agreement did not impose liability on the estate, she impermissibly shifted the burden of proof to the defendant to prove that he did have an honest and reasonable belief that his actions were justified. He further argues that the instruction, in essence, rendered that task impossible.

"'[T]he construction of an unambiguous written contract . . . [is] a pure question of law'" for the court. *Daley* v. *J.F. White Contr. Co.*, 347 Mass. 285, 288 (1964), quoting from *Taylor* v. *Gowetz*, 339 Mass. 294, 300 (1959). Here, the challenged instruction did not shift the burden of proof impermissibly to the defendant. Rather, it accurately reflected the current state of the law in this Commonwealth. See G. L. 203, § 14A. See also *Apahouser Lock & Security Corp.* v. *Carvelli*, 26 Mass. App. Ct. at 387-389. Throughout the charge the judge unequivocally placed the burden on the Commonwealth to prove every element of the offense beyond a reasonable doubt, including the element of fraudulent intent.[8] A reasonable jury would have understood that, if they found that the defendant relied in good faith on the advice of counsel in appropriating the funds in question, or that, if for any other reason he had an honest and reasonable, although mistaken, belief that he was entitled to take the money from his father's estate, they would have to find him not guilty. See *Commonwealth* v. *Schmukler*, 22 Mass. App. Ct. at 434-435.

4. *Jurisdiction of the Superior Court.* The defendant's final argument raises a challenge to the jurisdiction of the Superior Court. He maintains that, because sanctions against the defendant were available in the Probate Court, the matter should not have been the subject of a criminal prosecution. The argument is without merit.

The Superior Court has original jurisdiction over all crimes. G. L. c. 212, § 6. See *Commonwealth* v. *Parrotta*, 316

[8] Indeed, the judge told the jury:

"In all of this, of course, it is the Commonwealth's burden to prove that [the defendant] did have the fraudulent intent and, therefore, that he did not have a reasonable and honest and good faith belief that he was — that he had a legal right to withdraw the funds."

Mass. 307, 310 (1944). Moreover, the discretion to prosecure a criminal case is constitutionally vested in the District Attorney. *Commonwealth* v. *Gordon*, 410 Mass. 498, 498 & n.1 (1991) (citing art. 30 of the Massachusetts Declaration of Rights). See also *Commonwealth* v. *Vascovitch*, 40 Mass. App. Ct. 62, 63 (1996) (judicial branch of government may not interfere with the Commonwealth's executive power to prosecute a criminal case). Here, the availability of a monetary or contempt remedy against the defendant in the Probate Court does not alter the fact that a Superior Court jury found beyond a reasonable doubt that the defendant committed the crime of fiduciary embezzlement. Indeed, nearly all criminal acts may also give rise to civil causes of action. See, e.g., *Commonwealth* v. *Schmukler*, 22 Mass. App. Ct. at 435 (in the absence of fraudulent intent, a fiduciary may be liable civilly). See also *Commonwealth* v. *Abbott Engr.*, 351 Mass. 568, 572 (1967) (crime of larceny by false pretenses, as opposed to tort of deceit, requires Commonwealth to prove additional element of intent).

The defendant suggests that the availability of a civil remedy in a particular case operates to deprive the Superior Court of jurisdiction, thereby rendering the prosecution of any criminal offense arising out of the same events impermissible. The consequences of such a rule would be absurd.

Judgment affirmed.

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
1412 Courthouse, Boston, Massachusetts 02108
617-557-1020

IRVING MARMER, ESQUIRE
34 Emerson Place
Boston, MA 02114

RE: Docket No. FAR-09372 426 Mass. 1101

COMMONWEALTH

vs.

THOMAS E. GARRITY, THIRD

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review has been considered by the Court and is denied.

JEAN M. KENNETT, Clerk

Dated: September 25, 1997

To: JAMES W. SAHAKIAN, A.D.A.
ROSEMARY DALY, A.D.A.
IRVING MARMER, ESQUIRE

INDEMINITY AGREEMENT

WHEREAS, T. Edmund Garrity, John P. Garrity and David B. Garrity, as Trustees of the Helen B. Garrity Trust, are owners of the property designated as 18-20 Townsend Road, Belmont; and

WHEREAS, Donald W. Ryan (Trustee of the 18-20 Townsend Road Trust) entered into a Purchase & Sale Agreement for said property; and

WHEREAS, said property, prior to the date of said Purchase & Sale Agreement, contained Urea Formaldehyde foam Insulation; and

WHEREAS, on November 24, 1985, said Urea Formaldehyde Foam Insulation was removed by an Insulation Contractor named, Daniel J. O'Leary, 18 Brown Street, Beverly, MA 01915; and

WHEREAS, Donald W. Ryan, Individually and as Trustee as aforesaid, desires to inspect said premises through his expert, which permission the Trustees have granted; and

WHEREAS, the Sellers have agreed to indemnify the said Donald W. Ryan, Individually and as Trustee as aforesaid.

NOW THEREFORE:

1. The Trustees of the Helen B. Garrity Trust warrant to the Purchaser of said property that on or about November 24, 1985 the Urea Formaldehyde Foam Insulation at 18-20 Townsend Road, Belmont was removed in four steps as follows:
   Step 1: The removal of the insulation;
   Step 2: *A vacuum void;*
   Step 3: Neutralization of the walls with sodium Bi-U-Sulfite ($NaHSO_3$);
   Step 4: Re-insulate walls.
2. The Helen B. Garrity Trust, acting through all of its Trustess, hereby indemnifies and agrees to hold harmless Donald W. Ryan, Individually and as Trustee of the 18-20 Townsend Road Trust from any and all claims of

injury, sickness or illness or other damage to any person or entity which bears a proximate and direct causal relationship to the Urea Formaldehyde Foam Insulation formally in said premises and which claim results in the issuance of a judgment in favor of any such person or entity after a contested trial.

3. In the event that any such claim for injury or damage is made by any person or entity against the said Donald W. Ryan, Individually or as Trustee as aforesaid, he agrees to notify the Trustees of the Helen B. Garrity Trust forthwith and grants to said Trustees the right to defend against said claim at its expense.

IN WITNESS WHEREOF, the Helen B. Garrity Trust has caused this Indemnity Agreement to be executed by its Trustees, T. Edmund Garrity, John P. Garrity and David B. Garrity.

Helen B. Garrity Trust
By:

/s/ T E G
T. Edmund Garrity

/s/ J P G
John P. Garrity

/s/ D B G
David B. Garrity

1785C

[INVOICE — DANIEL J. O'LEARY]

TO: Whom It May Concern

DATE: 11/24/85

I, Daniel J. O'Leary, have removed the urea formaldehyde Foam Insulation at 18-20 Townsend Rd. Belmont per contract.

Step 1 Remove Insulation
Step 2 Vacuum Void
Step 3 Neutralize Walls w/Sodium Bi-U-Sulfite (NA HSO_3)
Step 4 Re-insulate walls

Job Quality 100%

s/ illegible

s/ DANIEL J. O'LEARY

I, Donald W. Ryan do hereby assign to myself, Donald W. Ryan and Thomas E. Garrity, III, all rights, title and interest in this document entitled "Indemnity Agreement." (Please see cover letter dated 5/13/86 from Walter H. McLaughlin, Sr.).

s/ DONALD W. RYAN
June 16, 1986

I, HELEN B. GARRITY, of Belmont in the County of Middlesex and Commonwealth of Massachusetts, hereby transfer in trust the assets listed in Schedule A, to T. Edmund Garrity, Sr., Thomas E. Garrity, Jr., and John P. Garrity, all of Belmont in the County of Middlesex and Commonwealth of Massachusetts, as trustees. The terms of this trust cannot be altered, amended, revoked to terminated by the settlor, and she retains no beneficial interest, vested or contingent, hereunder.

FIRST: This Trust shall be divided in eight separate shares. One share shall be held for the benefit of each of my nieces and nephews, Thomas E. Garrity, Jr., John P. Garrity, Robert K. Garrity, Paul D. Garrity, Jeannine E. Holway, David B. Garrity, George D. Garrity and Stephen J. Garrity and shall be disposed of as follows:

A. During the lifetime of each of my nieces and nephews the net income of that share held for his or her benefit shall be paid to or applied for the benefit of that niece or nephew. In addition, the principal may also be paid to or applied for the benefit of said beneficiary in such amount as the trustees in their uncontrolled discretion shall determine.

B. Upon the death of each of my nieces and nephews, the then remaining principal and income of that beneficiary's share shall be paid to his or her children in equal shares, children of deceased children taking their parent's share by right of representation.

C. In the event that any of my nieces or nephews is not survived by issue but is survived by a spouse, then at said niece or nephew's death the trustees shall continue to hold that beneficiary's share as long as said spouse is living and unremarried and shall pay said spouse the net income from that share as long as that spouse shall live and remain unmarried. Upon the death or remarriage of that spouse, the remaining principal shall be disposed of in accordance with Paragraph D.

D. In the event that any of my nieces and nephews die and are not survived by issue and the provisions of Paragraph C

are no longer applicable, then the remaining principal and income from any share shall be distributed pro rata among all of the other shares created by this trust even if the funds of some of the other shares have been distributed and shall be held and disposed of according to their terms.

SECOND: The interest of each beneficiary in the income or principal of a share under this instrument shall be free from the control or interference of any creditor of a beneficiary or of any spouse of a married beneficiary and shall not be subject to attachment or susceptible of anticipation or alienation.

THIRD: The whole or any part of the income or principal paid hereunder to any minor or to any other person who, in the opinion of the trustees is incapacitated through illness, age or other cause may be applied by the trustees in their discretion for such beneficiary's comfort, maintenance, support or education. Any such application may be made at such time and in such manner as he deems advisable whether by direct payment of such beneficiary's expenses or by payment to a selected person for such beneficiary; in each case the receipt of such person to whom payment is made or entrusted shall be a complete discharge of the trustee in respect thereof.

FOURTH: The trustees are authorized to mingle the trust property of the separate shares established by this instrument, allotting to each separate share an undivided interest in the mingled funds, which undivided interest shall always be equal to that share's proportionate contribution to the mingled funds.

FIFTH: The trustees shall each year render an account of their administration to me. After my death such account shall be rendered to each person who is then a beneficiary of the trust.

SIXTH: No trustee hereunder who has contributed to the trust property shall be entitled to compensation for his services. All other trustees shall be entitled to reasonable compensation for their services.

SEVENTH: In extension and not in limitations of the powers given them by law or other provisions of this instru-

ment, the trustees shall have the following powers with respect to each such share and its property, in each case to be exercised from time to time in their discretion:

A. To retain indefinitely any investments and to invest and reinvest in stocks, shares and obligations of corporations, of unincorporated associations or trusts and of investment companies or in a common trust fund without giving notice to any beneficiary, or in any other kind of personal or real property, notwithstanding the fact that any or all of the investments made or retained are of a character or size which, but for this express authority, would not be considered proper for trustees.

B. To make loans with adequate interest and with adequate security.

C. To sell, to exchange, to lease, and to make contracts concerning real or personal property for such consideration and upon such terms as to credit or otherwise as the trustees may determine, which leases and contracts may extend beyond the term of the trust; to give options therefor; to execute deeds, transfers, leases and other instruments of any kind.

D. To hold bonds, shares or other securities in bearer form, or in the name of the trustees or in the name of a nominee, with an indication of any fiduciary capacity; to deposit cash in a checking or savings account in a bank, with an indication of any fiduciary capacity.

E. To give general or special proxies or powers of attorney for voting or acting in respect of shares or securities which may be discretionary and with power of substitution; to deposit shares or securities with or transfer them to protective committees or similar bodies; to join in any reorganization and to pay assessments or subscriptions called for in connection with shares or securities held by them.

F. To improve or develop real estate, to borrow money and give mortgages; to construct, alter or repair buildings or structures on real estate; to settle boundary lines and easements and other rights with respect to real estate; to partition and

to join with co-owners and others in dealing with real estate in any way.

G. When paying trust principal or dividing or distributing wholly or partly in kind by allotting and transferring specific securities or other personal or real property or undivided interests therein as part or the whole of any one or more shares or payments, at current values.

All powers given to the trustee by this instrument are exercisable by the trustees only in a fiduciary capacity.

NINTH: No surety shall be required of the original trustees hereunder or of any successor trustee.

There shall always be three trustees.

Upon the death or incapacity of John P. Garrity, T. Edmund Garrity, Sr., or Thomas E. Garrity, Jr., I nominate my nephew Paul D. Garrity, of Winchester, Massachusetts, as successor trustee. The trustees, in turn, and each of their successors, shall have the power to appoint his successor from amongst any of my nieces and nephews by an instrument in writing duly acknowledged and recorded in Middlesex South District Registry of Deeds.

Any new trustee shall assume office upon a recording of his appointment and acceptance of the trust in the Middlesex South District Registry of Deeds.

A trustee may resign at any time by an instrument in writing delivered to the remaining trustee or trustees, and if there is no remaining trustee, to the Probate Court.

The action of all of the trustees in office (if a vacancy in the office of trustee exists, or if a trustee is incapacitated, the trustee or trustees in office and not incapacitated may act pending the filling of the vacancy or until such incapacity is removed) shall be required in order to act in any matter affecting the trust.

References in this instrument to "trustees" shall be deemed to include not only the original trustees, but also any successor trustee, and all powers and discretions vested in the trustees shall be vested in and exercisable by any such successor trustee.

No one dealing with the trustees need inquire concerning the validity of anything they purport to do, or need see to the application of any money paid or any property transferred to or upon the order of the trustees and any one dealing with the trust may rely on any recorded instrument signed by the trustee with respect to matters affecting the trust.

No trustee shall be responsible for the acts or omissions of the co-trustees or for allowing the co-trustees to have custody or control of the funds, securities or property. Each trustee shall be responsible only for his or her acts or omissions in bad faith.

TENTH: This trust is a Massachusetts trust made in that State and is to be governed and construed and administered according to its laws and shall continue to be so governed and construed and administered even though administered elsewhere within the United States or abroad.

ELEVENTH: To the same effect as if it were the original, anyone may rely upon a copy certified by a trustee to be a true copy of this instrument (and of the writings, if any, endorsed thereon or attached thereto).

TWELFTH: The name by which this trust shall be known is the HELEN B. GARRITY TRUST and the signature of my trustees to any legal instruments shall be made in the following manner.

HELEN B. GARRITY TRUST

By: T. Edmund Garrity
John P. Garrity
Trustees.

Thomas Garrity, Jr.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 15th day of January in the year one thousand nine hundred and sixty-five.

Illegible HELEN B. GARRITY

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. January 15, 1965.

On this day personally appeared before me the above-subscribed Helen B. Garrity, who acknowledged the foregoing instrument to be her free act and deed.

s/ WALTER H. MCLAUGHLIN
Notary Public

We hereby accept the trust herein set forth.

T. EDMUND GARRITY

JOHN P. GARRITY

THOMAS GARRITY, JR.

Massachusetts General Laws, chap. 255, § 12I. Seller's Duties of Inspection, Testing, and Disclosure in Sale of Residential Dwelling Insulated With Urea Formaldehyde Foam Insulation.

Any person offering for sale a residential dwelling insulated with urea formaldehyde foam insulation, hereinafter called UFFI, shall determine whether UFFI is in the dwelling and, if it is, shall have the dwelling tested for formaldehyde gas and shall make the following disclosure to any prospective purchaser: (1) where such UFFI is located within the building, and, if known, when it was installed; (2) a copy of the test results; and (3) a copy of information developed by the department of public health concerning formaldehyde levels in dwellings insulated with UFFI and dwellings not insulated with UFFI.

The commissioner of public health shall provide by regulation for the form of notice which meets the requirements of this section.

Massachusetts General Laws, chap. 203, §14A. Personal Liability of Trustee.

Unless otherwise provided in the contract, a trustee shall not be personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he failed to reveal his representative capacity and identify the trust estate in the contract.

A trustee shall be personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he was personally at fault.

Claims based on contracts entered into by a trustee in his individual capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee was personally liable therefor.

The question of liability as between the trust estate and the trustee individually may be determined in an accounting, surcharge, indemnification or other appropriate proceeding.

Massachusetts General Laws, chap. 266, § 57. Embezzlement by Trustee, etc.

A trustee under an express trust created by a deed, will or other instrument in writing, or a guardian, conservator, executor or administrator, or any person upon or to whom such a trust has devolved or come, who embezzles or fraudulently converts or appropriates money, goods or property held or possessed by him for the use or benefit, either wholly or partially, of some other person or for a public or charitable purpose, to or for his own use or benefit or to or for the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid,

or who otherwise fraudulently disposes of or destroys such property, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than two thousand dollars and imprisonment in jail for not more than two years.

Constitution of the United States

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence .

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States;

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.